In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-812

THOMAS TONE STORER, et al., *Appellants,*

vs.

EDMUND G. BROWN, JR., et al., *Appellees.*

GUS HALL, et al., *Appellants,*

vs.

EDMUND G. BROWN, JR., *Appellee.*

On Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLANTS

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JURISDICTION

The jurisdiction of the court below was invoked pursuant to 42 U.S.C. §§1981, 1983, 1985(3) and 1988; 28 U.S.C. §§1331(a), 1343(4), 1357, 2201, 2202, 2281, and 2284; Article I, §2, Clause 2, of the United States Constitution; and the First and Fourteenth Amend-

ments to the United States Constitution. The judgment of the court below was entered on September 8, 1972, and notice of appeal was filed in that court on September 13, 1972. Probable jurisdiction was noted and the cases consolidated on March 5, 1973. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253.

OPINION BELOW

The opinion of the District Court for the Northern District of California is as yet unreported; it is included in the Appendix at pp. 84-91.

QUESTIONS PRESENTED

1. Whether California Elections Code §§6830(c) and 6830(d) which, singly or in combination, operate to deny appellants their right to appear on the ballot, to nominate persons of their choice for the ballot and to vote for persons of their choice, violate the First and Fourteenth Amendments because they condition access to the ballot on unreasonable conditions supported by no legitimate state interest.

2. Whether California Elections Code §§6830(c) and 6830(d) further violate Article I, §2, Clause 2, of the United States Constitution by adding qualifications for the office of U.S. Congressman.

3. Whether California Elections Code §§6830(c), 6830(d), 6833, 6864 and 6831, which, singly or in com-

bined effect, make it impossible for an independent candidate to secure a place on the ballot, violate the First and Fourteenth Amendments by denying appellants due process and the equal protection of the law in the fundamental protected area of the right to vote and run for office.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Fourteenth Amendment, due process and equal protection clauses:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article I, §2, Clause 2:

> "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

California Elections Code §6830:

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

California Elections Code §6831:

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State

Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

California Elections Code §6833:

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

California Elections Code §6864:

"Verification deputies appointed to obtain signatures to the nomination paper of any candidate

may, at any time not more than 84 nor less than 59 days prior to the election, obtain signatures to the nomination paper of the candidate."

California Elections Code §6430:

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial

election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participated in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words 'Petition to participate in the primary election.' No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters. Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

California Elections Code §6082:

"Nomination papers for candidates for delegates of any party should be signed by not less than one-half of 1 percent and not more than 2 per-

cent of the vote constituting the basis of percentage."

STATEMENT OF THE CASE

Thomas Tone Storer was a candidate for the United States Congress in California's Sixth Congressional District. He was an independent who wished to appear on the November 7, 1972, general election ballot and be so designated.

Storer is an attorney at law who has been politically active in California's Marin County for a number of years. In November of 1964 he was elected to the Board of Supervisors of Marin County; he defeated an incumbent in a run-off election. In 1966 he won the Democratic nomination for United States Congressman in the First Congressional District (which then included Marin County) but was defeated by the incumbent Congressman at the general election. In 1968 Storer sought re-election to the Board of Supervisors and was narrowly defeated.

Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his dissaffection

with the Democratic Party formal by changing his registration from "Democrat" to "Decline to State" (i.e., under California law, "Independent") in January of 1972.

Gus Hall and Jarvis Tyner are members of the Communist Party of the United States. They were candidates for the offices of President and Vice-President, respectively, of the United States in the November 7, 1972 election. They desired to run as independent candidates for those offices in the State of California and to be so designated on the election ballot. They collected and properly filed 25,000 nomination signatures, well in excess of the 18,000 required for recognized parties to place a candidate on the Presidential ballot in California.

All of the appellant-candidates were ready, willing, and able to tender the required filing fee and to meet any other reasonable requirements for positions on the ballot in California as independent candidates. Appellees refused to place their names on the ballot, relying on the following provisions of California law:

A. California Elections Code §§6833, 6864, 6830 and 6831 which, in combined effect, make it virtually impossible for any one to qualify as an independent candidate on a November election ballot:

1) §6831 prohibited appellants' names from appearing on the ballot unless they had acquired the signatures of not less than 5% nor more than 6% of the entire vote cast in the preceding general election.

2) §§6833 and 6864 gave appellants but 24 days in which to acquire those signatures. They were not permitted to circulate nomination petitions for voters' signatures before August 15, 1972, and would have had to acquire the requisite number of valid signatures by September 8, 1972.

3) California Elections Code §6830(c) provides that no person could validly sign appellant-candidates nomination papers who had voted in the primary election of June 6, 1972.

By contrast, a partisan candidate for Congress may appear on a primary ballot with no more than 40 signatures of sponsors and persons are not prohibited from signing his nominating papers by virtue of their participation in any elections. A partisan candidate for President or Vice President may appear on the primary ballot with no more than 18,000 signatures of sponsors and, likewise, they are not excluded by virtue of their participation in any elections.

B. California Elections Code §6830(d) prohibits any person who has been registered as affiliated with a political party at any time after June 6, 1971, from appearing on the ballot as an independent candidate. Storer had been registered as affiliated with the Democratic Party until January of 1972.

C. California Elections Code §6830(c) prohibits anyone who has voted "at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Con-

gress. Storer voted in the primary election of June 6, 1972, in order to exercise his franchise on non-partisan matters; but because nominees for the office of United States Representative from the Sixth Congressional District were voted upon by partisan voters at that primary election, Storer's exercise of his right to the franchise resulted in his being unable to appear on the ballot as an independent Congressional candidate.

The three appellant-candidates in these suits are joined by registered voters who wished to sign nomination papers but were foreclosed, by California law, from doing so.

These appellants were foreclosed from signing nomination papers for an independent candidate because they had voted in the Democratic Primary of June 6, 1972. They were foreclosed from signing the nomination papers even though they signed no nomination papers for any other candidate for the respective offices in the primary election of June 6, 1972, or for the general election of November 7, 1972. Indeed, two of these appellants, Johnson and Soladay, while voting in the Democratic Party Primary, did not cast votes for either of the candidates for the Democratic nomination for Congressman of the Sixth Congressional District.

Storer and his co-appellants filed their suit on May 30, 1972, contending that the California scheme regulating the appearance of independent candidates on the ballot violated the following fundamental Constitutional rights:

a) The right to seek and hold office;

b) The right to equal protection of the laws;

c) The right to due process of law;

d) The right freely to express views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

And they contended, further, that California Elections Code §6830(d), by absolutely prohibiting Storer from appearing on the ballot because he had, within the past year, been affiliated with the Democratic Party, and California Elections Code §6830(c), by absolutely prohibiting Storer from appearing on the ballot as a candidate for United States Representative because he voted in the primary election of June 6, 1972, unconstitutionally added to the qualifications for Representative in the United States Congress in violation of Article 1, §2, Clause 2 of the United States Constitution.

In their prayer, appellants sought a declaration that the challenged sections of the California Elections Code are unconstitutional and an injunction providing that, upon Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Sixth Congressional District, defendants be required to certify Storer as a candidate for United States Representative in the Sixth Congressional District and defendants be required to place his name on the ballot.

On August 11, 1972, Hall and his co-plaintiffs filed suit attacking Elections Code §§6830(c), 6831, 6833, and 6864 on the same grounds as Storer, but as they applied to Presidential candidacies. Three-judge courts, identical in composition, were convened to hear both suits. The District Court heard argument in *Storer* on August 31, 1972, and at the Court's suggestion, counsel for *Hall* stipulated that their case would be submitted on the briefs and the *Storer* argument.

The judgment of the Court below, denying, on the merits, the relief prayed for by appellants was filed on September 8, 1972. See Appendix p. 84. The Notice of Appeal was filed on September 13, 1972.

On September 14, 1972, appellants applied to Mr. Justice Douglas for an injunction. The relief for which they prayed, pending disposition of this case on appeal, was the placing of their names on California's general election ballot of November 7, 1972. Oral argument before Mr. Justice Douglas was heard on September 15, 1972, in Gooseprairie, Washington. Mr. Justice Douglas denied appellants' Application for Injunctive Relief on that same date.

SUMMARY OF ARGUMENT

Appellants are candidates for federal office unaffiliated with political parties recognized in California who sought a place on the November 1972 general election ballot, supporters who desired to circulate

and sign their nominating petitions and voters who wished to cast their ballots for these candidates or some of them.

The candidates were denied a place on the California ballot by virtue of a confluence of California statutes designed to favor candidates of recognized political parties and make it virtually impossible for independents to appear on the ballot.

California justifies the challenged statutory scheme on the plea that it has a legitimate interest in maintaining a ballot of manageable size. All agree that the interest in a manageable ballot is legitimate but appellants maintain that this interest may not be pursued in an overbroad fashion and that California may demand as a price for appearing on the ballot only that the candidate demonstrate substantial support in the community. Furthermore, the measure of support must be politically neutral; it cannot heavy-handedly favor candidates affiliated with political parties over independents.

By that test, the California scheme is infirm. California's concern with a manageable ballot is only evident where independents are concerned. Although the candidate of a political party may appear on the ballot if his party received but 2% of the vote at the last general election and even though his party's share of registered voters had dropped to 1/15 of 1%, the independent must produce valid signatures of 5% of the voters in the last general election. Requiring independents actively to solicit and obtain the signatures of 5% of the electorate for ballot space while

permitting political parties to linger on with but 2% of the vote passively acquired in the last election hardly comports with the announced objective of limiting the ballot to those with substantial community support or with traditional notions of equal protection of the laws. Surely it cannot survive the "strict scrutiny" directed at statutes controlling the exercise of First Amendment rights.

Aside from the disparity between the demonstration of community support required of political party candidates on the one hand and independents on the other, California's statutory scheme broadly stifles the exercise of First Amendment rights when the legitimate end it is ostensibly promoting (limitation of the ballot to candidates with substantial community support) can be achieved without effectively disenfranchising independents. Although California could, if it did not so disproportionately favor candidates of political parties with little community support, require an independent to produce the signatures of 5% of the electorate, it cannot burden the 5% requirement with unrealistic barriers which unduly favor party-nominees. But that is what California does. The signatures of 5% of the electorate must be collected in a twenty-four day period coming at that time, in the late summer, when voters are most likely to be away on vacation. For good measure, no one may sign an independent candidate's nomination papers who voted, on a non-partisan or partisan ballot, at the primary election. This latter condition has two devastating effects: 1) it gives candidates affili-

ated with parties a prior, uncontested crack at the voters while requiring the independent candidate to persuade voters not to vote, even on significant ballot propositions, at the primary election; 2) it removes about 70% of the electorate from the pool of persons eligible to sign independent nominating petitions thus making the 5% requirement, in reality, a 25% requirement.

Obviously, California can adopt other means than these which would keep the ballot manageable and, at the same time, not suffocate the independent voice.

The above-described electoral scheme deprived all appellants of precious First Amendment liberties. Appellant Storer, and his supporters, suffered some additional, impermissible disabilities. Storer was absolutely prohibited from appearing on the ballot because he had cast a non-partisan ballot in the primary election and he was further and independently disqualified because he had been registered as a Democrat within the seventeen-month period preceding the general election. Why one should be disqualified from running as an independent because he voted a non-partisan ballot at the primary has never been explained by appellees. Appellees have explained the seventeen-month "purification period" for ballot status as an independent—but not very convincingly. It is said the requirement is a precaution against party-hopping and party-raiding. Oddly enough, one may actually party-hop and become a candidate on a partisan-primary ballot without enduring a seventeen-month waiting period. Seven months is all that is

required of the genuine party-hopper. But it is idle to talk of party-hopping and raiding without the essential ingredient—a party. Storer did not hop parties and he could not raid one for he was not a member of one. What appellees seem to be saying is that the state has an interest in requiring one to remain in a party as the price for ballot status. But the state has no interest in requiring membership in a political party as a condition for ballot status; indeed, the First Amendment forbids it. And so does Article I, §2, cl. 2 of the United States Constitution; requiring candidates to be members of political parties adds a qualification for the office not contained in the Constitution.

ARGUMENT

I.

CALIFORNIA ELECTION CODE §§6830(c), 6831 AND 6833, INDIVIDUALLY AND IN COMBINATION, MAKE IT VIRTUALLY IMPOSSIBLE FOR AN INDEPENDENT CANDIDATE TO APPEAR ON THE GENERAL ELECTION BALLOT; CONSEQUENTLY THEY VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Those unaffiliated with a political party who seek a place on California's ballot are confronted with a staggering and suffocating set of restrictions. They must, in the late summer, in the period of 24 days, obtain valid signatures of 5 percent of the electorate, that 5 percent to be drawn exclusively from persons who did not vote in the spring primary election. Con-

sidered in its totality,[1] California's electoral scheme makes it virtually impossible for a candidate unaffiliated with an established, statutorily recognized political party to appear on the ballot. In sharp contrast, established political parties are nearly insured ballot space for their candidates. In order to maintain their place on the ballot they need have but one candidate for state-wide office poll 2 percent of the vote at the preceding gubernatorial election; to remain a viable and recognized political party their registered members need be no more than 1/15 of 1 percent of the state's entire registration.[2]

Under any theory of equal protection of the laws, this incredible disparity would be suspect. That suspicion matures to conviction when, as here, the statutory scheme in issue controls the political process and the right to vote, a "fundamental political right" that is "preservative of all rights." *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 999 (1972); *Reynolds v. Sims,* 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).

> In the present situation the state laws place burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank

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[1] *Jenness v. Fortson,* 403 U.S. 431 (1971); *Williams v. Rhodes,* 393 U.S. 23 (1968).

[2] Cal. Elec. Code §6430.

among our most precious freedoms. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).[3]

Appellants represent a broad spectrum of persons engaged in the exercise of their fundamental political rights. Appellants include voters, persons attempting to participate in the nominating process and candidates for office. The voter-appellants, of course, seek to exercise the right of franchise in its most pristine form. Appellants attempting to influence the political process by participating in nominating a candidate for office are also engaged in the exercise of First Amendment rights.[4] And the candidates, too, are

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[3]See, also, *Reynolds v. Sims*, 372 U.S. 533, 555 (1964): "The right to vote freely for the candidates of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." And *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Additionally see, generally, *Bullock v. Carter*, 405 U.S. 134 (1972); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806 (1970); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 101 (1969); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *United States v. Saylor*, 322 U.S. 385 (1944); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *United States v. Mosley*, 238 U.S. 383 (1915); *Guinn v. United States*, 238 U.S. 347 (1915); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 37 (1879).

[4]*Williams v. Rhodes, supra; Moore v. Ogilvie*, 394 U.S. 814, 818 (1969); *Briscoe v. Kusper*, 435 F.2d 1046, 1053 (7th Cir. 1970); *Puerto Rican Organization for Political Action v. Kusper*, 350 F.Supp. 606 (N.D. Ill. 1972); *Gonzales v. City of Sinton*, 319

seeking to exercise First Amendment rights, whether running for office be deemed a constitutional right in itself[5] or a correlative and essential aspect of the right to vote.[6]

Because appellants are attempting to exercise fundamental constitutional rights, the state may not justify its discriminatory treatment of them on the simple and easy plea that some legitimate objective is rationally promoted by its statutory scheme. The

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F.Supp. 189, 190 (S.D. Tex. 1970); *Communist Party v. Peek*, 20 Cal.2d 536, 543 (1942); *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912); *Hopper v. Britt*, 204 N.Y. 524, 98 N.E. 86, 88 (1912); cf. *Reynolds v. Sims*, *supra*, 377 U.S. at 565.

[5]*Draper v. Phelps*, 351 F.Supp. 677 (W.D. Okla. 1972); *Socialist Workers Party v. Martin*, 345 F.Supp. 1132 (S.D. Tex. 1972) (three-judge court); *Duncantell v. City of Houston, Texas*, 333 F.Supp. 973, 975 (S.D. Tex. 1971); *Thomas v. Mims*, 317 F.Supp. 179, 181 (S.D. Ala. 1970); *White v. Snear*, 313 F.Supp. 1100, 1103 (E.D. Pa. 1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969), *appeal dismissed*, 397 U.S. 94 (1970); *Zeilenga v. Nelson*, 4 Cal.3d 716, 720-721 (1971); *Lasseigne v. Martin*, 202 So.2d 250 (Ct.App. La. 1967); *Fisher v. Taylor*, 210 Ark. 380, 196 S.W.2d 217, 220 (1946); *Holliday v. O'Leary*, 115 P. 204 (Mont. 1911); *Ragan v. Junkin*, 122 N.W. 473 (S.Ct. Neb. 1909); *Shields v. Tronto*, 395 P.2d 829 (Utah, 1964).

[6]See *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972) ("the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates have at least some theoretical, correlative effect on voters"); *Hadnott v. Amos*, 394 U.S. 358, 366 (1969); *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969); *Green v. McKeon*, 468 F.2d 883 (6th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 719-720 (W.D. Tex. 1972) (three-judge court); *Bolanowski v. Raich*, 330 F.Supp. 724, 729 (E.D. Mich. 1971); *Stapleton v. Clerk for City of Inkster*, 311 F. Supp. 1187, 1190 (E.D. Mich. 1970); and see *Turner v. Fouche*, 396 U.S. 346, 362-363 (1970):

> [T]he appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The state may not deny to some the privilege of holding public office that is extended to others on the basis of distinctions that violate federal constitutional guarantees." (Footnotes omitted).

special classification of independent candidates must be given close scrutiny; it may only be sustained if the appellants can demonstrate that there is a "compelling" interest served by the statutory scheme that overrides appellants' right to vote, organize effectively and run for office.[7] Moreover, appellee cannot justify its burdens on the right of franchise as "compelling" unless it can demonstrate that it cannot promote its interest by a narrower, carefully drawn mechanism that would be less subversive of the right to vote. It has long been established that where a statute infringes upon fundamental rights "precision of regulation must be the touchstone."[8]

A statute lacking such precision is unnecessarily broad. In seeking to do A (a constitutionally per-

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[7] *Bullock v. Carter*, 405 U.S. 134 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Brennan, White & Marshall, JJ., concurring and dissenting); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes, supra.* Cf. *Harper v. Virginia State Board of Education*, 383 U.S. 663 (1966). Accord *Yale v. Curvin*, 345 F.Supp. 447 (D.R.I. 1972) (three-judge court); *Manson v. Edwards*, 345 F.Supp. 719 (S.D. Mich. 1972); *People's Party v. Tucker*, 347 F.Supp. 1 (M.D. Pa. 1972) (three-judge court); *Ferguson v. Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972) (three-judge court); *Nagler v. Stiles*, 343 F.Supp. 415 (D.N.J. 1972) (three-judge court); *Pontikes v. Kusper*, 345 F. Supp. 1104 (N.D. Ill. 1972) (three-judge court); *Socialist Workers Party v. Welch*, 334 F.Supp. 179 (S.D. Tex. 1971); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, 989 (S.D.N.Y.) (three-judge court), aff'd, 400 U.S. 806 (1970).

[8] *Dunn v. Blumstein, supra*, 92 S.Ct. at 1003, *United States v. Robel*, 389 U.S. 258, 265 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

missible purpose) it also unnecessarily invades B ("area of protected freedom.")[9]

The essential notions are breadth and necessity. In *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) this Court put it thusly:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end can be more narrowly achieved.* (Emphasis added).[10]

The burden of demonstrating the absence of alternative means for advancement of a state purpose less restrictive of fundamental rights is on appellee. It is, in other words, "plainly incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses [as may be constitutionally regulated] without infringing First Amendment rights." *Sherbert v. Verner,* 374 U.S. 398, 407 (1963). If the state fails the stringent alternatives test, that is the end of the matter; the challenged regulation must fall; the constitutional rights of appellants will not be balanced against the state's allegedly "com-

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[9]See Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67, 75-76 (1960); *Zwickler v. Koota,* 389 U.S. 241, 249-250 (1967); *Aptheker v. Secretary of State,* 378 U.S. 500, 508-509 (1964); *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940).

[10]"And if there are other, reasonable ways to achieve those [legitimate] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn v. Blumstein, supra,* 92 S.Ct. at 1003. Laws restricting the right of franchise must be "tailored so that the exclusion of appellant . . . is necessary to achieve the articulated goal." *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 632 (1969).

pelling" interest. *United States v. Robel,* 389 U.S. 258, 268, fn. 20 (1967).

Measured against the standards of the "compelling interest" test and its corollary, the "alternative means" test, the impediments California imposes on the ballot-access of independents cannot pass constitutional muster. The only justification that could fairly be characterized as "compelling" which California has advanced for its independent nomination electoral mechanism is its concededly significant interest in keeping the size of the ballot manageable. But the interest in a short ballot cannot justify the state adopting any means it please to achieve the end.[11] If California's Democratically controlled legislature should pass a law excluding from the ballot candidates of any political party that did not equal Democratic registration it is hard to imagine a plea that this made for an uncluttered ballot being seriously entertained. An analogous situation obtains here. Unless it can be said that California can be legitimately interested in favoring candidates of political parties over independent candidates its "short ballot" justification for its independent nominating procedures must fail. And it cannot be said that California has a legitimate interest in favoring those

[11] *Johnston v. Luna,* 338 F.Supp. 355 (N.D. Tex. 1972) (three-judge court); *Lasseigne v. Martin,* 202 So.2d 250 (Ct.App. La. 1967); cf. *Bullock v. Carter, supra; Williams v. Rhodes, supra; Jenness v. Miller,* 346 F.Supp. 160 (S.D. Fla. 1972). If "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit," *United States v. Robel, supra,* 389 U.S. at 263, the same must be true of the phrase "short ballot."

candidates affiliated with political parties.[12] The very notion of a state interest in favoring candidates of established political parties affronts the principle that "the Constitution visualizes no preferred class of voters. . . ." *Gray v. Sanders,* 372 U.S. 368, 380 (1963).

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved to the virtue of political activity by minority, dissident groups, which enumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society. *Sweezy v. New Hampshire,* 354 U.S. 234, 250-251 (1957) (Opinion of Warren, C.J.).

The state, then, may not seriously contend that it has an interest in impeding independent access to the ballot for the purpose of promoting favored political parties. And since it may not do so, its contention that the present scheme is necessary in order to insure a manageable ballot is contradicted by its permissiveness when it comes to allowing established political parties to maintain a ballot position.[13] A concern for manageable ballots which manifests itself only when those unaffiliated with a political party attempt to exercise their constitutional rights is not the sort of concern that has generally been denominated "compell-

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[12] *Williams v. Rhodes, supra; Beck v. Hummel,* 150 Ohio St. 139, 140 (1948); *Moore v. Walsh,* 286 N.Y. 552, 37 N.E.2d 555 (1941); *In re Terry,* 203 N.Y. 293, 96 N.E. 931, 933 (1911).

[13] See, *supra,* p. 18; Cal.Elec. Code §6430.

ing." And, compelling or not, the interest in having a manageable ballot can be achieved without stifling the electoral power of non-partisan voices. There is simply no excuse for California's short-term period for circulating independent nominating petitions or its exclusion, from those who may sign the petitions, of a majority of the electorate.

Assuming, because of *Jenness v. Fortson*, 403 U.S. 431 (1971)[14] that California, like Georgia, may constitutionally condition independent ballot access on the filing of nominating petitions signed by 5 percent of the registered voters,[15] still there is no valid reason for the unrealistic time limit and the requirement that one, even if he is unaffiliated with a political party, forsake the right to vote in the primary if he is to participate, as a candidate or petition signer, in the independent nominating process.[16] In *Jenness*, the Court observed that in Georgia any political organization was free to endorse any otherwise eligible person as its candidate, that a six month period was provided for the obtaining of the signatures of 5

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[14]And see, *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D. Ill. 1971) (three-judge court), *aff'd mem.*, 403 U.S. 925 (1971).

[15]The assumption is arguendo. Since California allows a political party to remain on the ballot although it has obtained but 2 percent of the vote in the last election, it is in no position to insist that *Jenness* controls. In Georgia a political party cannot maintain ballot status unless it received at least 20 percent of the vote at the preceding gubernatorial or presidential election. California, unlike Georgia, requires the independent to demonstrate more support than the established political party.

[16]In California, independents, as well as those who are registered with a political party, may vote in the primary. Independents vote for non-partisan offices and on ballot propositions. See California Elections Code §§10290, 10291, 10298 and 10318.

percent of the eligible electorate, that a voter might sign a petition even though he signed the petition of another, that the signer was free to participate in the party primary and that, generally, "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." *Jenness v. Fortson, supra,* 403 U.S. at 438-39. None of that is true in California. California's Elections Code §6830(c) excludes from the group of potential signers those who have voted in the primary and thus makes available for the independent only about 30 percent of the electorate. By requiring appellants to obtain the signatures of 5 percent of this limited electorate, California has, in effect, placed on appellants a burden greater than a requirement that they produce the signatures of 20 percent of the registered voters in the district. And this immense number of signatures must be gleaned from a small portion of the general public, unidentifiable by any physical or geographical traits, which is composed of those persons least interested in the electoral process (those who did not even bother to vote in the primary election). For good measure, all this must be done in a period of twenty-four days during that time, in the latter part of August, when residents are most likely to be away on vacation and when persons solicited for signatures are most likely to be non-resident vacationers.

This immense burden, greater in magnitude than the 15 percent requirement struck down in *Williams v. Rhodes,* 392 U.S. 23 (1968), should be struck down on the authority of *Williams* alone. But it has some additional infirmities.

In the first place, California Elections Code §6830(c), by prohibiting those who have voted in the preceding primary election from signing nomination papers of an independent candidate, unconstitutionally conditions the exercise of a fundamental right on the relinquishment of another fundamental right. Co-appellants of the appellant-candidates are prohibited from signing the petitions of an independent candidate because, and solely because, they exercised their right to vote. They had no control over the names of candidates who appeared on their primary ballot, they signed no nominating petitions for candidates appearing in the primaries, and Storer's co-appellants, Johnson and Soladay, did not even vote in the primary for either of the choices presented to them. In order to sign the petition of Storer, a candidate who emphasified ecological issues, they would have had to surrender their right to vote in a primary where ecological issues appeared as ballot propositions.

The state may not condition the exercise of one constitutional right (in this case the right effectively to participate in the electoral process by signing the nomination papers of a candidate for office) on the abandonment of another constitutional right (in this case the right to vote in an election). See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Secondly, even if §6830(c) prohibited, in the customary fashion, voters who signed the *nominating papers* of a partisan candidate from signing those of

an independent candidate, it would still be constitutionally infirm because the statutory period for collecting signatures on partisan nominating papers *precedes* that of the period in which to acquire signatures on nominating papers of an independent candidate. Thus partisan candidates are given an unfair advantage, the opportunity to approach signators before independent candidates may even become formal candidates. The placing of such a special obstacle on independent candidates has been raised in two federal cases with which appellants are familiar. In both it was avoided by a statutory construction which left the independent candidate on essentially the same footing as partisan candidates. See *Moore v. Board of Elections for District of Columbia,* 319 F.Supp. 437 (D.D.C. 1970); *Jackson v. Ogilvie, supra.* §6830(e), however, cannot be saved by statutory construction. It places a special obstacle on the independent candidate by removing from his group of nomination supporters some 70 percent of the electorate before the period in which he may gather his signatures even begins.

Finally, the requirement that appellants obtain all these signatures from such a limited, unidentifiable and elusive group within a twenty-four day period is simply preposterous. What conceivable purpose can it serve? None but to hector the candidate and insure that the requirement will rarely, if ever, be satisfied. "The three-week requirement is suffiocating and effectively blocks access to the ballot by all but the most disciplined of minority political organizations.

It freezes the status quo and reduces the voters' choice to a bare minimum." *People's Party v. Tucker*, 347 F.Supp. 1, 4 (M.D. Penna. 1972) (three-judge court).[17]

A manageable ballot size is decidedly a legitimate state concern. When properly and neutrally promoted that concern may fairly be called a compelling interest. Neutrality, though, is the lynchpin. A state may require that ballot positions be confined to those who have demonstrated some significant support among the electorate. But the measure of significant support cannot be weighted, as California weights it, in favor of those affiliated with political parties. It cannot require the independent to show community support at a level almost three times that required of a party, especially when the independent's support has to be generated by active community solicitation while the party's support is demonstrated by the simple marking of last election's ballots. And when the state requires the independent actively to solicit the electorate for support it may not unreasonably burden his solicitation with three-week time limits and arbitrary restrictions on which members of the electorate he is permitted to approach. Obviously there are less restrictive means for determining which candidates have significant community support. Just as obviously, those less restrictive means can be fashioned in a neutral manner which does not favor those affiliated

[17]In *People's Party* the court struck down a provision requiring political bodies wishing their candidates to appear on the ballot to secure the signatures of 2 percent of the largest vote cast in the state at the last election in a three-week period.

with a party without in any way advancing the ostensible goal of limiting ballot choices to those with significant support.

California Elections Code §§6830(c), 6831 and 6833, because they favor candidates affiliated with political parties more than is necessary to promote the interest of limiting the ballot to those with significant support and because they do not promote that interest by the least restrictive means, violate the First Amendment and the Fourteenth Amendment's due process and equal protection clauses.

II.

THE PROHIBITION OF APPELLANT STORER'S APPEARANCE ON THE BALLOT BECAUSE HE VOTED IN A NON-PARTISAN PRIMARY ELECTION AND BECAUSE HE HAD BEEN REGISTERED AS A DEMOCRAT DURING THE SEVENTEEN-MONTH PERIOD PRECEDING THE ELECTION AFFRONTS THE FIRST AND FOURTEENTH AMENDMENTS

Appellant Storer and his co-appellant supporters suffered a special impediment in their attempts to secure a position for him on the November ballot as an independent candidate for Congress. Had every voter in the district signed a nominating petition for Storer he would, nevertheless, have been prohibited from appearing on the ballot for two reasons: (1) although unaffiliated with any political party at the time of the June primary election, Storer did cast a non-partisan ballot at that election[18] and was, by virtue of California Elections Code §6830(c), thus

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[18]See fn. 16, *supra*.

disqualified from appearing on the general election ballot as an independent; (2) although Storer abandoned his Democratic Party affiliation some ten months before the general election, California Elections Code §6830(d) required him to disaffiliate some seventeen months before the general election on pain of disqualification for ballot status as an independent nominee for Congress.

Neither §6830(c) nor §6830(d) serve any state interest other than the impermissible one of keeping independent nominees off the ballot. As to §6830(c) the point, we take it, is conceded. No one has ever been able to produce a legitimate reason for disqualifying an independent from the ballot because he, as an independent, voted a non-partisan primary ballot. §6830(c) is the very model of "simple-minded" electoral discrimination mentioned in *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

As to §6830(d) the point is not conceded. Appellees insist, and the Court below held, that requiring an independent to disaffiliate seventeen months before he seeks office somehow promotes a legitimate state concern in inhibiting "party hopping," although Storer did not hop parties, and "party raiding," although Storer joined no political party and was thus ill-positioned for a raid.

Putting aside, for the moment, the conceptually difficult notion that one raids a political party when he leaves it, we turn to the seventeen-month period.

A seventeen-month purification period is manifestly too long. Party-raiding can be forestalled by a wait-

ing period of much shorter duration. A valid waiting period must conform to the realities of party-raiding dangers or fall for overbreadth. It is "unreasonable and excessive," *Nagler v. Stiles*, 343 F.Supp. 415, 418 (D.N.J. 1972) (three-judge court), and "unduly restrictive." *Yale v. Curvin*, 345 F.Supp. 447, 451 (D.R.I. 1972).[19]

That seventeen months is too long a purification period is, curiously enough, recognized by California's election laws where actual party-hopping is involved. California Elections Code §6401 permits one to run for a party's nomination for Congress in the primary and appear on the ballot even though he has been a member of that party for less than seven months. Thus California favors real party-hoppers over independents by a period of ten months and justifies that irrational discrimination as a precaution against

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[19]In both *Nagler* and *Yale* the courts assumed that the waiting period sustained by this Court in *Rosario v. Rockefeller*, ___ U.S. ___, 41 L.W. 4401 (March 21, 1973), was, because shorter, reasonable and distinguishable. See also *Gordon v. Executive Committee of Democratic Party*, 335 F.Supp. 166, 169 (D.S.C. 1971):

> Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or actions of elected representatives may have convinced the voter that a change in party allegiance is warranted. (P. 451-452).

But see *Lippit v. Cipollone*, 337 F.Supp. 1405 (N.D. Ohio 1971) (three-judge court), *aff'd*, ___ U.S. ___, 92 S.Ct. 729 (1972). It should be emphasized that in *Lippit* the effect of Article I, §2 of the United States Constitution, discussed *infra*, III, p. 34, was neither raised nor considered. And in *Lippit*, of course, the statute actually dealt with a waiting period after *joining* a party, not after *leaving* a party to become an independent.

party-hopping. §6830(d), it turns out, is a no more "sophisticated" electoral discrimination than §6830(c).

Especially is that so when we realize that concern for party-hopping and raiding is misplaced unless focused upon people joining political parties. Without a party to be raided a party-raiding statute looks paltry and out-of-place. Storer did not hop among parties and, since he registered with none, fears that he might raid one were exaggerated.

The state cannot argue that there is any such thing as "independent" loyalty or that it has an interest in insisting that the disaffected, if they are to seek political office, must remain within the party which has engendered their disaffection.

It is one thing to maintain that the state has a legitimate interest in insuring that the nominees of a political party are loyal to that party's principles. It is quite another to maintain that the state has a legitimate interest in generally promoting political loyalty to partisan parties and has the power to withdraw political rights from those who would announce their independence of political parties. The state has as much business requiring us to belong to a political party as it would requiring us to attend church. If there is one thing that is unambiguously clear about the First Amendment it is that the state does not have the power to promote orthodoxies, be they political or otherwise. See *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943).

Far from being a "compelling interest" which overrides appellants' political rights, California's insis-

tence upon loyalty to some political party as the price for candidacy promotes no legitimate interest at all but seeks to do precisely what the First Amendment prohibits.

III.

CALIFORNIA ELECTIONS CODE SECTIONS 6830(c) AND 6830(d), WHICH DENY A PLACE ON THE BALLOT TO CANDIDATES WHO VOTED AT THE IMMEDIATELY PRECEDING PRIMARY OR WHO REGISTERED WITH A POLITICAL PARTY DURING THE YEAR PRECEDING THE IMMEDIATELY PRECEDING PRIMARY, VIOLATE ARTICLE I, SECTION 2, CLAUSE 2 OF THE UNITED STATES CONSTITUTION BY ADDING QUALIFICATIONS FOR THE OFFICE OF THE UNITED STATES CONGRESS

In its effort to foreclose independent candidates from a place on the ballot, California has added two special burdens on those who would seek election as a non-partisan. Elections Code §6830(c) requires:

> [a] statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

Similarly, Elections Code §6830(d) requires:

> [a] statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as af-

filiated with a political party qualified under the provisions of Section 6430.[20] The statement re-

[20]Elections Code §6430 sets forth the requirements for qualification as a recognized political party.

§6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters. Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since

quired by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

Appellant Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his disaffection with the Democratic Party formal by changing his registration from "Democrat" to "Declined to State" (i.e., under California law, "Independent") in January of 1972. Under the terms of §6830(d) he was therefore ineligible for a place on the ballot as an independent candidate in November, 1972, because he has been registered with the Democratic Party at some time after June 6, 1971 (the one year preceding the June 6, 1972 California primary, the primary next preceding the general election for which Storer sought a place on the ballot).[21]

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the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

[21] When Storer filed his petition for a place on the ballot, he was informed by Peter Meyer, Marin County Elections Clerk, that he could not be listed because he had been a member of a party within the past two years. Affidavit of Thomas Tone Storer. Appendix page 27.

He was further disqualified by virtue of §6830(c) because he voted at the June 6, 1972 primary election.[22] Thus, even if he had been able to meet the onerous requirements of Elections Code §§6833, 6864 and 6831 he would still have been denied a place on the ballot.

The requirement that Storer give up his right to the franchise and that he not have been registered with a political party constitute additional qualifications for the office of Member of Congress in violation of Article I, §2, cl. 2 of the United States Constitution, which sets forth the exclusive qualifications for Members of Congress.[23]

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[22]Storer did not vote for a candidate for Congress, but he did vote for local offices and for and against questions presented to the voters on the primary ballot. Complaint, Para. X(b), Appendix, p. 11.

[23]"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."
Article II, §5 of the United States Constitution sets forth qualifications for the office of President similar to those set forth by Article I, §2, cl. 2 for the office of Member of Congress:

> No person except a natural-born citizen or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible for the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Appellant Hall, however, while a candidate for the office of President, had neither registered with a recognized political party in the State of California nor voted at the next preceding primary election. Therefore, although Elections Code §§6830(c) and 6830(d) prescribed additional qualifications for the office of President as well as for Member of Congress, those qualifications did not personally operate to bar appellant Hall.

A. The Qualifications of Age, Citizenship and Residency set forth in Article I, Section 2, clause 2 of the United States Constitution constitute the sole and exclusive Qualifications which may be set for Members of Congress.

Article I, §2, cl. 2 provides:

> Qualification of Members.
>
> No person shall be a Representative who shall not have attained to the Age of 25 Years, and been 7 Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Until *Powell v. McCormack,* 395 U.S. 486 (1969), this Court had never decided whether the qualifications set forth in Article I, §2, cl. 2 were minimal qualifications to which the states and Congress itself could add others or a complete statement of the qualifications to which the states or Congress could add no more. This Court resolved the question in *Powell,* however, in an opinion in which Chief Justice Warren concluded for eight members of the court that "the House is without power to exclude any member-elect who meets the Constitution's requirements for membership." 395 U.S. at 546.

In *Powell,* Congressman Adam Clayton Powell, a Congressman for many years, had been re-elected in 1966, but denied his House seat because of allegedly unwarranted assertions of privilege and immunity from the processes of New York courts and of allegedly wrongful diversion of House funds and the alleged filing of false reports concerning spending of foreign currency. The House of Representatives recognized that Powell met the Article I, §2, cl. 2

qualifications of age, citizenship and residency, but excluded him from the seat, invoking its right under Article I, Section 5, clause 1 to judge the qualifications of its members.[24] This Court held, however, that the power of the House to judge the qualifications of its members extends only to a determination as to whether the challenged member met the Article I, §2, cl. 2 age, citizenship and residency requirements. 395 U.S. at 550. The result was founded upon an analysis of the preconvention experience in England, of the convention debates preceding and during the ratification of the Constitution, and on Congress' own understanding of its power in post-ratification times.

1. The decision of the Constitutional Convention to set exclusive Qualifications for Members of Congress was dictated in part by legislative abuses in Britain and a desire to prevent legislatures from controlling the qualifications of elected representatives.

The powerful conviction of the Founders that "the qualifications of elected representatives of the people were fundamental articles in a Republican Government and ought to be fixed by the Constitution,"

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[24] Article I, §5, cl. 1:

> Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

The House also argued that regardless of its power to determine qualifications, it was empowered to expel a member under Article I, Section 5, clause 2. ("Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 2/3 expel a member.") The Court rejected that argument, holding that "exclusion and expulsion are not fungible proceedings." 395 U.S. at 512.

[remarks of Mr. Madison, 2 Farrand, *Records of the Federal Convention* 249] reflected a determination on their part to guarantee that contemporaneous activities of the British Parliament "subversive of the rights of" the British people never be tolerated in this country. Thus Mr. Madison "observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or religious parties" Farrand, Vol. 2, p. 250.

Madison warned that permitting a Legislature to control in any way the qualifications of elected representatives of the people was a path by which "a Republic may be converted into an aristocracy or oligarchy," Farrand, Vol. 2, p. 249, much as the will of the British electorate was threatened by Parliament's arbitrary exclusion of unpopular members such as John Wilkes. Chief Justice Warren succinctly summarized the Wilkes case and its impact on the Framers in *Powell, supra:*

> By 1782, after a long struggle, the arbitrary exercise of the power to exclude was unequivocally repudiated by a House of Commons resolution which ended the most notorious English election dispute of the 18th century—the John Wilkes case. While serving as a member of Parliament in 1763, Wilkes published an attack on a recent peace treaty with France, calling it a product of bribery and condemning the

Crown's ministers as "'the tools of despotism and corruption.'" R. Postgate, That Devil Wilkes 53 (1929). Wilkes and others who were involved with the publication in which the attack appeared were arrested. Prior to Wilkes' trial, the House of Commons expelled him for publishing "a false, scandalous, and seditious libel." 15 Parl.Hist.Eng. 1393 (1764). Wilkes then fled to France and was subsequently sentenced to exile. 9 L. Gipson, The British Empire Before the American Revolution 37 (1956).

Wilkes returned to England in 1768, the same year in which the Parliament from which he had been expelled was dissolved. He was elected to the next Parliament, and he then surrendered himself to the Court of King's Bench. Wilkes was convicted of seditious libel and sentenced to 22 months' imprisonment. The new Parliament declared him ineligible for membership and ordered that he be "expelled this House." 16 Parl. Hist.Eng. 545 (1769). Although Wilkes was re-elected to fill the vacant seat three times, each time the same Parliament declared him ineligible and refused to seat him. See 11 Gipson, *supra*, at 207-215.

Wilkes was released from prison in 1770 and was again elected to Parliament in 1774. For the next several years, he unsuccessfully campaigned to have the resolutions expelling him and declaring him incapable of re-election expunged from the record. Finally, in 1782, the House of Commons voted to expunge them, resolving that the prior House actions were "subversive of the rights of the whole body of electors of this kingdom." 22 Parl.Hist.Eng. 1411 (1782).

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed." 16 Parl.Hist.Eng. 589, 590 (1769). Certainly English practice did not support, nor had it ever supported, respondents' assertion that the power to judge qualifications was generally understood to encompass the right to exclude members-elect for general misconduct not within standing qualifications. With the repudiation in 1782 of the only two precedents for excluding a member-elect who had been previously expelled it appears that the House of Commons also repudiated any "control over the eligibility of candidates, except in the administration of the laws which define their [standing] qualifications." T. May's Parliamentary Practice 66 (13th ed. T. Webster 1924). See Taswell-Langmead, *supra,* at 585. . . .

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause celebre* for the colonists. "[T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press * * * They named towns, counties, and even children in his honour." 11 Gipson, *supra,* at 222. It is within this historical context that we must examine the Convention debates in

1787, just five years after Wilkes' final victory. 395 U.S. at 527-531 (Footnotes omitted.)[25]

Although Wilkes' case, like that of Congressman Powell, grew out of the attempt of the national legislature to seize from the electorate control over the parliamentary body's membership, the teaching of that case is not limited to its impact on the interaction between qualification for office and the will of the *national* legislature. As the convention debates reveal, the Wilkes case had shown the Framers the importance of a set of qualifications for office which no legislature could alter to suit its own purposes.

2. It was the firm intention of the Framers that neither the separate states nor the national legislature itself was to have the power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House[26] were debated and accepted, and all other qualifications whatsoever were rejected, reveals the unmistakable intention of the Framers that neither the national Legislature nor the state legislatures were to have any power to alter, add to, vary or ignore the

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[25]For a more complete history of the Wilkes case and contemporaneous parliamentary problems, see *Powell*, Briefs of Counsel, *supra* at 34-46; Postgate, *That Devil Wilkes* (New York 1929), pp. 11, 51-53, 82; *Watkins v. United States*, 354 U.S. 178, 190, 191 (1957).

[26]Article I, §2, cl. 2 reads:

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",[27] and the power of the state legislatures to set the "times, places and manner of holding elections for Senators and Representatives,"[28] was in the intention of the Framers, restricted solely to those qualifications set forth in the Constitution itself.[29]

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention*, p. 248, et seq., the Convention turned to a proposal of Gouverneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250.[30] The effect of this proposal, Professor

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[27]Article I, §5, reads in pertinent part:
"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

[28]"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

[29]Counsel acknowledge reliance on, and direct the Court's attention to, the extensive historical research in this area presented by counsel for the petitioner in *Powell v. McCormack*, 395 U.S. 496 (1969), *see*, United States Supreme Court Records, Briefs of Counsel, Volume 6251, Petitioners Opening Brief at 1-97.

[30]Gouverneur Morris' proposal arose out of a discussion which had great significance to the members of the Convention. After voting upon the age and residence qualifications the Convention was confronted with a proposal that an additional qualification of landed property be affixed to members of the Legislature. On June 26th, George Mason had suggested "the propriety of annexing to the office of Senator a qualification of property" Elliot's Debates, Vol. 5, p. 247. On July 26th, Mason further moved that "the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property . . . in members of the legislature . . ." Farrand, Vol. 2, p. 121. John Dickinson, of Delaware, strongly

Charles Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." Warren, *The Making of the Constitution,* 420.

In the ensuing debate, Mr. Williamson, of North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

> This could surely never be admitted. Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body. 2 Farrand, *Records of the Federal Convention,* p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as it deemed expedient would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:

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opposed such a clause stating that he "doubted the policy of interweaving into a Republican Constitution a veneration of wealth . . ." Farrand, Vol. 2, p. 123. On August 6, the Committee of Detail reported a provision that "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Farrand, Vol. 2, p. 179. At this point Charles Pinckney moved that the President and Judges also be required to possess "competent property to make them independent." Farrand, Vol. 2, p. 248. Benjamin Franklin strongly opposed his proposal stating that he "expressed his dislike of everything that tended to debase the spirit of the common people." Farrand, Vol. 2, p. 249. Pinckney's motion was "rejected by so general a *no* that the States were not called". Farrand, Vol. 2, p. 249. At this point Morris moved to give Congress unlimited power to fix qualifications. Farrand, Vol. 2, p. 250. This motion was defeated and following this the Convention rejected the clause as reported by the Committee. Farrand, Vol. 2, p. 251. For a more extensive discussion of the debates and parliamentary moves see Warren, *The Making of the Constitution,* pp. 412 to 426.

> Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. *A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect.* . . . Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction.

As Professor Charles Warren points out in his study of the Constitutional Convention, *The Making* of our Constitution (1928),

> [T]he Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four. Warren, p. 421, Farrand, Vol. 2, p. 250.

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250.

And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that: "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254.

Professor Warren notes, "the meaning of this provision (which became Article I, Section 5 of the Constitution, as finally drafted) is clearly shown if taken

in connection with the legislative actions and debates of August 10th which surrounded its enactment." Warren, *supra,* at p. 420. Warren continued:

> Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence. For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply. . . . *The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications.* Warren, *supra,* at p. 421. (Emphasis added.)

The oft-expressed fears of the Framers that the legislature might seize control of the voters' right to choose elected officials applied equally to state and national legislatures. Surely the Framers did not intend that the state legislatures would have power superior to the national legislature where qualifications for the national legislature were concerned. The debates before state conventions on the ratification of the Constitution demonstrate beyond a doubt that it was the intent of the Framers not only that the Congress be

prohibited from adding to the qualifications set forth in Article I, §2, cl. 2, *Powell v. McCormack,* 395 U.S. 486 (1969), but that the state legislatures be similarly confined.

3. The debates at the state conventions "demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution," Powell v. McCormack, 395 U.S. 486, 540 (1969) and that neither Congress nor the state may alter those qualifications.

Alexander Hamilton spoke simply to the New York convention of the duty of legislatures to honor the choice of the people:

> After all Sir, we must submit to the idea, that the true principle of a republic is, that the people should choose whom they please to govern them. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed. 2 Debates on the Federal Constitution 257 (J. Elliot, ed. 1876).

Robert Livingston told the same convention of the danger of permitting any legislature to come between the people and their individual elected representatives:

> The People are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. Elliot's Debates, *supra* at pp. 292-293.

Arguing before the Virginia convention for ratification, Wilson Carey Nicholas relied upon Article I, §2, cl. 2 to meet the arguments of Patrick Henry and

his supporters that the Constitution subverted popular democracy.

> Secondly, as it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. *This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence which create a certainty of their judgment being matured, and of being attached to their state.* Elliot's Debates, *supra,* Vol. III, at p. 8 (Emphasis added).

The examples stated above go to the very heart of the Constitution and the fears of the Framers that the legislature would, to use a phrase unknown at the time, become a Frankenstein, rising up to destroy and disenfranchise those who had created it. The power of the people to choose their representatives, so long as they met the minimal qualifications of Article I, §2, cl. 2, lay at the very heart of the Constitution. See *Newberry v. United States,* 256 U.S. 243, 256 (1921); Story, *Commentaries on the Constitution,* §§814 et seq.

This original understanding that the legislature would not abridge the natural right of the people to select their own representatives is fundamental to the Constitutional imperative of "a government of laws and not of men," *Marbury v. Madison,* 1 Cranch 137, 162 (1803) and applies to the state legislatures as well as to the power of Congress to judge its own members. As has been seen, a major difficulty of ratification centered around the need for direct popular democracy and a fear that that popular democracy would already

be in danger with Senators elected by state legislatures. The debate over Article I, §2, cl. 2, clearly reflected its place as a major safeguard against both national and state legislatures. See Elliot's Debates, *supra,* at pp. 292-293, and Vol. III at p. 8.

As Mr. Justice Reynolds[31] wrote for the Court in *United States v. Newberry, supra:*

> Section Four [Article I, Section 4, giving the Congress final control over the times, places and manner of House elections[32]] was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally to destroy the States. *In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon.* Mr. Hamilton asserted: "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times* the *places,* and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked

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[31]Justice Reynolds was joined by Mr. Justice Holmes, Mr. Justice McKenna and Mr. Justice Day.

[32]And over the times and manner of Senate elections: "The Times, places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Article I, §4 now governs times, places and manner of elections for both Houses. Seventeenth Amendment; *Gray v. Sanders,* 372 U.S. 368, 380-381 (1963).

> upon other occasions are defined and fixed in the Constitution and are unalterable by the Legislature." The Federalist, LIX, LI. . . . See, Story on the Const. §§814, 35 seq. 256 U.S. at p. 255-256. (Emphasis added.)

The concurring opinion in *Newberry* quotes with approval Hamilton's comments in Number 60 of the Federalist Papers which sets forth the policy reasons for a strict interpretation of Article I, §4, cl. 1, policy reasons which apply with equal force to the case now before the Court:

> What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest;' and it was to support this contention that there was 'no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times,* the *places,* and the *manner* of elections.'

> This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. *The restrictions arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed.* 256 U.S. at 283-284. (Justices Pitney, Brandeis and Clark dissenting in part.) (Emphasis in last sentence added.)

In *United States v. Classic,* 313 U.S. 299 (1940) This Court again spoke to the purpose of Article I, §2. Although *Classic* overruled the holding in *Newberry* that primaries were not a part of the electoral process to be regulated by Congress under Section 4, both the *Classic* and *Newberry* courts agreed with the fundamental importance of Article I, §2, as a safeguard of the right of the people to choose their representatives, subject only to constitutional qualifications.

> [A] dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I," 313 U.S. at 318, 320 (opinion of Mr. Justice Stone).

See, Stassen for President Citizen Committee v. Jordan, 377 U.S. 914, 927 (1964) (opinion of Justice Douglas dissenting; with Chief Justice Warren and

Justice Goldberg from a denial of certiorari); *Bond v. Floyd,* 385 U.S. 116 (1967).

4. The Action of Congress in the Post-Ratification period Indicated that Body's Understanding that Article I, Section 2, clause 2 Prescribed the Sole Qualifications for Congressional Office.

In the case of *William McCreery,* Tenth Congress, 1807, 1 Hinds §414, the House affirmed the exclusivity of Article I, §2, cl. 2. In seating a Congressman who met the cl. 2 requirements, but did not meet an additional state requirement, the House took up the very issue before the Court in this case and acknowledged fundamental Constitutional principles:

> 1. The people had delegated no authority to the States or to the Congress to add to or diminish the qualifications prescribed by the Constitution. 1 Hinds at p. 382. See in particular Annals of Congress for the 10th Congress, pp. 872, 875, 887-88, 893, 895, 909, 910, 915-16.
>
> 2. If they could do this [deviate from strict constitutional qualifications] any sort of dangerous qualifications might be established—of property, color, creed, or political professions. 1 Hinds at p. 382; Annals of Congress for the 10th Congress, pp. 873, 878, 895, 980-09, 913.
>
> 3. The people had a natural right to make a choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature. 1 Hinds at p. 382, Annals of Congress for the 10th Congress, pp. 873-74, 875, 895.

Accordingly, the House voted to seat the Congressman-elect after finding that he possessed the consti-

tutional qualifications, holding that those qualifications are exclusive and the sole requirements for taking the seat. Annals of Congress for the 10th Congress, pp. 878, 910, 911-12, 914, 918.

These principles, responsive to the constitutional mandate established only twenty years previously, reflected an understanding on the part of the members of the House in the first days of the Republic that what is here involved is the most fundamental principle of a democratic society—the right of the people freely to elect their own representatives. Thus Representative Desha expressed the deep-felt sentiments of the House underlying its actions in the precedent-making decision when he said:

> On this occasion, the question was whether . . . any State Legislature, or any other power of legislation, could add qualifications to any member of that House . . . every contraction of qualifications for Representatives was an abridgement of the liberty of the citizens. The power of adding other qualifications than those fixed by the Constitution would . . . be a breach of the right of suffrage. . . . We are placed here as guardians of the people's rights and privileges. Do not then let us hold out with one hand a fair appearance of zeal for the rights of the people and the public good, and at the same time take every advantage imaginable with the other, by curtailing their Constitutional privileges, and, instead of allowing the people a complete range to select a man worthy of representing them in Congress, confine them to certain situations. I dislike this kind of political hypocracy. I dislike anything that looks like sporting with the rights of the

> people, with the rights of those that I consider the firm supporters of the republican fabric. Annals of Congress for the 10th Congress.

This case in the House, arising in the earliest days of the Republic, has of course great importance, for, as Chief Justice Taft said in *Myers v. United States,* 272 U.S. 52, 175 (1926), "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *See also,* the cases of *Turney v. Marshall* and *Fouke v. Trumbull,* 34th Congress, 1856, 1 Hinds, p. 384. ("It is a fair presumption that when the Constitution prescribes these qualifications as necessary to a Representative in Congress it was meant to exclude all others." 1 Hinds, at p. 385; "By the Constitution, the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any qualifications whatever." 1 Hinds at 386); *Case of Benjamin Star,* 37th Congress (1862), 1 Hinds, §433; *Francis v. Shoemaker,* 73rd Congress, 77 Cong. Rec. 131, 132, 133, 134, 136, 139 (1933).

In *Grafton v. Conner,* 41st Congress (1870), Cong. Globe, Part 3, 41st Cong., 2d Sess. 1869-70, pp. 2322-23, Representative Oath succinctly stated the issue:

> Turn to the Constitution and see what is prescribed in reference to the qualifications of a

> member of this House. Mr. Conner has the requisite age. He has the requisite residence. He has the requisite certificate of his election from the proper authorities. The Committee of Elections has so reported, and that settles the prima facie case.

So too does Thomas Tone Storer have the requisite age. He has the requisite residence and citizenship. He lacks only the certificate of election and he may lack that because the State of California unconstitutionally abridged his right to win that certificate.

5. State and lower federal Court Decisions interpreting the power of states to add to the qualifications for Congress have almost uniformly determined that the states may not add such qualifications; none has permitted qualifications such as those required by California.

Although this Court has not had occasion to address the apparent tension between Article I, §2, cl. 2 and Article I, §4, cl. 1,[33] the state and lower courts have uniformly held that a state legislature may no more add to Congressional qualifications than the national legislature could. In fact, of course, there is far less reason to permit states to alter qualifications for federal office, since to do so would alter the balance between federal and state governments so carefully worked out by the Framers. The highest state courts

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[33]The argument was made in *MacDougall v. Green*, 335 U.S. 281 (1948) that signature-gathering requirements including provisions which required candidates for state-wide office to secure signatures in each county constituted added qualifications for the office of Senator. The *MacDougall* Court did not reach the merits, but in a *per curiam* decision held the issues to be non-justiciable. 33 U.S. at 284. *MacDougall* was over-ruled *sub silentio* in *Baker v. Carr*, 369 U.S. 186 (1962) and *Williams v. Rhodes*, 393 U.S. 23 (1968).

have indeed themselves been sensitive to the problems of federalism which arise when states involve themselves in the qualifications of national officers.

In *In re O'Connor,* 17 N.Y.S. 2d 758 (1940) the New York Supreme Court refused to reject the independent nominating petition of Earl Browder, then President of the Communist Party of the United States as a candidate for Representative in Congress. Opponents sought to enjoin the placement of his name on the ballot on the grounds that he was ineligible "by reason of his open espousal of international Communism and his avowed standing as a leader of the Communist Party in America." 17 N.Y.S. 2d at 759. The Court succinctly stated the principles governing that case, principles entirely apposite here:

> Under our fundamental law, the Constitution of the United States, there are but three qualifications for membership in the lower house of Congress: (a) one must be at least twenty-five years of age; (b) he must have been a citizen for at least seven years; and (c) he must be an inhabitant in the state in which he is chosen (U.S.C.A. Const. Article I, Section 2, clause 2). It has been frequently held by the courts and by the Congress itself, in contested election cases, that the mere possession of these enumerated qualifications entitles one to election to the office of Representative. As Judge Story stated in his "Commentaries on the Constitution" (section 625): "It would seem but fair reasoning upon the plaintiffs principles of interpretation, that when the Constitution established certain quali-

> fications as necessary for office, it meant to exclude all others as prerequisites"—and as Cooley stated it in his "General Principles of Constitutional Law" (3d Ed., pp. 285, 290): *"The Constitution and laws of the United States determined what shall be the qualifications for federal office, and state constitutions and laws can neither add to nor take away from them."* 17 New York S.2d at 759 (Emphasis added.)

And in *Hellmann v. Collier,* 141 A.2d 908, 217 Md. 93 (1958) the Maryland Court of Appeals struck down Article III, Section 158(c) of the Maryland Code which required that every candidate for election to the House of Representatives be a resident of the district in which he seeks election. The Court in *Hellmann* looked to how Congress had handled an earlier case in which two Illinois state judges had been elected to the House of Representatives despite a state law which prohibited state judges from being elected to any office in the federal government. Judges Marshall and Trumbull, asked the House to seat them and invalidate the Illinois constitutional restriction. The *Hellmann* Court cited with approval the decision of the House committee:

> The qualifications of a Representative, under the Constitution, are that he shall obtain the age of 25 years, shall have been 7 years a citizen of the United States, and, when elected, an inhabitant of the state in which he shall be chosen. It is a fair presumption that, when the Constitution prescribes these qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally

> clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence. 1 Hinds' Precedents of the House of Representatives, Sections 415, 416; 1 Bartlett, Cases of Contested Elections, pp. 167, 168, 169. Quoted 141 A.2d at 910.

The Maryland court, in *Shub v. Simpson,* 196 Md. 177, 76 A.2d 332 (1950), had earlier invalidated a state statute that required a candidate for Congress to execute an oath under that state's subversive activities act. The court held that such an oath would impose an additional qualification to those named in the federal Constitution and could not stand. See also, 1 Story, *Commentaries on the Constitution of the United States,* (4th Edition), Section 625; 1 Willoughby, *Constitutional Law of the United States,* (Section Edition) Section 337.

Similar attempts to add qualifications to the office of Representative or Senator have been struck down by other state courts, *Danielson v. Fitzsimmons,* 232 Minn. 149, 44 N.W.2d 184 (1950) (conviction of a felony); *State ex rel. Sundfor v. Thorson,* 72 N.D. 246, 6 N.W.2d 89 (1942) (prohibition of defeated primary candidate from running in general election); *Ekwall v. Stadelman,* 146 Ore. 439, 30 P.2d 1037 (1934) (prior oath by judge that he would accept no

other non-judicial office during his term); *State v. Crane,* 65 Wyo. 189, 197 P.2d 864 (1948) (governor not eligible for elective office during his term); *Stockton v. McFarland,* 56 Ariz. 138, 106 P.2d 328 (1940) (judges not eligible for elective office during term); *State ex rel. Wettengel v. Zimmerman,* 249 Wis. 237, 24 N.W.2d 504 (1946) (petition to remove Joe McCarthy from Senate ballot because he was a judge, dismissed); *State ex rel. Chandler v. Howell,* 104 Wash. 99, 175 P. 569 (1918) (judge ineligible for other office).[34]

Nor have the lower federal courts, with the exception of the District Court below, failed to recognize the exclusive nature of the Article I, §2, cl. 2 qualifications. In *Dillon v. Fiorina,* 340 F.Supp. 729, 731 (1972) a three-judge district court for the District of New Mexico struck down a state statute requiring a candidate for a party's nomination to have been a registered party member for at least a year before the primary. ("The New Mexico scheme adds an impermissible requirement of at least two years residency to the qualifications for United States Senator and is therefore void.") *See also, Stack v. Adams,* 315 F.Supp. 1295, 1298 (N.D. Fla. 1970) (candidate must resign from state office), in which the three-

[34]Two statutes, none of which constituted the irrevocable and permanent disability which the California statutes place on a candidate, have been upheld by state courts. The Maryland Court of Appeals upheld a requirement that the candidate appoint a campaign manager, *Secretary of State v. McGucken,* 244 Md. 70, 222 A.2d 693 (1966), and a Florida statute providing that current officeholders could not run for concurrent office, was upheld in *Holley v. Adams,* 238 S.2d 401, 408 (1970). *McGucken* was decided before *Powell. Holley* did not cite *Powell.*

judge district court relied on *Powell, supra,* as having disposed of the qualification question; *Exon v. Tiemann,* 279 F.Supp. 609 (D.Neb. 1968) (state cannot require Congressman to live in district from which he was nominated).

B. California Elections Code Sections 6830(c) and 6830(d) add Qualifications for the office of Member of Congress.

It may be argued that any scheme which makes, as does the California scheme, it virtually impossible for an independent candidate to secure a place on the ballot, is in fact a "qualification" for members of Congress. It matters not that California does not regulate the age, residence or citizenship of a candidate for office, if, by other means such as the statutory scheme involved here, it could exclude all but a small proportion of persons who otherwise meet the qualifications enumerated in Article I, §2, cl. 2. Although Article I, §4, cl. 1 permits the state to regulate the time, place and manner of elections, at some point such regulations might become so oppressive as to constitute an added qualification for office in derogation of the requirements of Article I, §2, cl. 2. That issue need not be reached here, however, for Code Sections 6830(c) and 6830(d) present clear additional requirements to candidacy, requirements which do not relate to the time, place and manner of the election in question. A person who desires to run as an independent must wait a full year after leaving his or her party before doing so, and he or she must give up the right to vote at the next preceding primary, including the right to vote for local and state candidates and for questions

presented to the voters. Although Storer did not vote for a Congressional candidate at the next preceding election, Appendix, p. 12, he refused to give up his right to vote for other offices and was thus barred from the ballot by virtue of §6830(c). Similarly, having left the Democratic Party at the beginning of the Presidential Campaign, he was barred from the ballot by virtue (or lack thereof) of §6830(d).

The qualifications are not innocuous—indeed, in Storer's case they simply could not be met. California, ironically, asks would-be independent candidates for Congress to give up the right to vote, that fundamental right which is "preservative of all other rights." *Dunn v. Blumstein,* 405 U.S. 330, (1972). And it disqualifies as independent candidates those persons who have just left a party, those whose political feeling runs high and who are prepared to offer the electorate enormous energy and concern.

It is arguable that if someone had sufficient help and large amounts of money he might have been able to meet the onerous burden set forth by the operation of California Elections Code §§6833, 6864 and 6831. It is unlikely but it is conceivable. The entire California electorate, however, could not have got Thomas Storer on the ballot for Congress. The qualification was personal to him and irremedial. And it violated the clear and exclusive qualifications of Article I, §2, cl. 2.

In *Fowler v. Adams,* 315 F.Supp. 592 (M.D. Fla. 1970), *injunction granted,* 400 U.S. 1205 (1970); *appeal dismissed,* 400 U.S. 986 (1971), a three-judge

district court agreed that a state could not set added qualifications for Congress, but held that a filing fee was not such an added qualification. The court held that a fee was not "personal" to the candidate, since others could pay it for him. Whatever the merits of that argument *(see, **Bullock v. Carter,*** 405 U.S. 134 (1972), striking down a similar fee as violative of the Fourteenth Amendment), it is clear that Storer's disqualification is personal to him. There was no way he could secure a place on the ballot in the face of §§6830(c) and 6830(d).

California Elections Code Sections 6830(c) and 6830(d), by adding qualifications to the office of Member of Congress, violate the express terms of Article I, §2, cl. 2 and cannot stand. If Congress itself may not add to the qualification required of its own members, *Powell v. McCormack,* 395 U.S. 486 (1969), surely the state legislators may not.[35] The people of California have a right to choose their representatives in the national government unrestricted by the state government's notion of the qualifications required by those representatives.

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[35]California, by adding qualifications which keep candidates off the ballot, also makes it impossible for the House to exercise its judicial function under Article I, §5, cl. 1 in judging the qualifications of members, since Storer can never get to the House for a determination of the validity of §§6830(c) and 6830(d). *See, Powell, supra;* "The Supreme Court, 1968 Term," 83 *Harv. L. Rev.* 7, 68 (1969); *William McCreery,* Tenth Congress, 1807, 1 Hinds §414.

CONCLUSION

The latest public opinion polls report a dramatic decline in the people's trust of government—a decline that is all the more disturbing in an election year when the voters had an opportunity to register their disapproval by electing new officials.

But the electoral choices did not seem attractive to large numbers of citizens. To them the political air was stagnant and the dialogue pointless. In California, new registrants are declining to affiliate with any political party in unprecedented numbers. In some counties the number of new registrants who identify themselves as independents exceeds the number of new Republican registrants and threatens the Democrats.

Surely these people have a right to run for office and just as surely they have the right to choose from among candidates other than those designated by the political parties with which they refuse to affiliate.

It was not the intent of the Framers to limit the electorate's choice to Democrats and Republicans, there being no Democrats or Republicans at the time the Constitution was adopted. They envisioned an open society, free of governmentally imposed political orthodoxy, in which the ballot would be a mirror genuinely reffecting the will of the people. California's election laws are not consistent with that vision; they affront it and work to blur it.

For all the reasons mentioned, appellants respectfully urge that the judgment of the United States

District Court for the Northern District of California should be reversed.

Dated, San Francisco, California,
May 18, 1973.

Respectfully submitted,

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